IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 29TH OCTOBER 2007 / 7TH KARTHIKA 1929

RSA.No. 726 of 2007()

AS.85/2003 of II ADDL. DISTRICT COURT, PALAKKAD
OS.946/2000 of ADDL.MUNSIFF COURT, PALAKKAD
.....

APPELLANT/APPELLANT/2ND DEFENDANT

APPUKUTTAN, S/O. KRISHNAN,
VALPARAMB, LAKSHMI NIVAS, PUDUPPARIYARAM,
PALAKKAD.

BY ADV. SRI.VINOD KUMAR.C

RESPONDENTS: RESPONDENTS/PLAINTIFF - 3RD DEFENDANT
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1. RADHAKRISHNAN, S/O. KRISHNAN,
REPRESENTED BY POWER OF ATTORNEY HOLDER
SATYABHAMA, KARUNALAYAM, MUTHUKKAD,
KINASSERY, PALAKKAD.

* 2. CHANDRAN, S/O. KRISHNAN,
RESIDING AT KARUNALAYAM, MUTHUKKAD, KINASSERY,
PALAKKAD. ***(DELETED)***

(R2 DELETED FROM THE PARTY AT THE RISK OF THE
APPELLANT AS PER ORDER DATED 11.10.2007 IN
I.A.No.1764/2007)

BY ADV. SRI.P.R.VENKETESH

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 29/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

R.S.A.No. 726 of 2007

Dated this the 29th October, 2007.

J U D G M E N T

The second defendant in O.S.No.946/2000, on the file o f the Munsiff Court, Palakkad, is the appellant in this appeal. The appeal is filed against the order dismissing a petition to condone the delay in filing the appeal and to judgment and decree passed by the court below dismissing the appeal as barred by limitation. The respondent filed a suit for declaration and recovery of possession. The suit was contested by the appellant. Overruling the contention raised by the appellant, the trial court found that the sale deed executed on the strength of power-of-attorney alleged to have been executed by the respondents in favour of the appellant was void and not binding on the respondents. The trial court ordered recovery of possession of the property. The decree and judgment was passed on 28.8.2002. Challenging that decree and judgment, appellant filed A.S.No.85/2003, before the District Court, Palakkad. The appeal was filed after the expiry of the period of limitation for filing the appeal. So, appellant filed I.A.No.818/2003 under Section 5 of the Limitation Act for condoning the delay of 180 days in filing the appeal. Lower Appellate

Court dismissed I.A.No.818/2003, and dismissed the appeal also. Appellant had filed this Regular Second Appeal challenging the decree and judgment passed by the lower appellate court dismissing the appeal, on the ground of limitation. He is challenging the order passed in I.A. also in this second appeal. The second appeal was also filed with a petition to condone the delay, and the same was allowed, on payment of cost of Rs.2000/=. Thereafter, the appeal is admitted and respondent-plaintiff-entered appearance.

2. At the time of admission, the appeal was admitted on the following substantial questions of law:-

> "1) Whether the dismissal of AS 85/2003 consequent to the dismissal of the IA 818/2003, petition for condonation of delay, without considering the real issues on merit in the appeal is legally sustainable or not.
>
> 2) Whether the finding of the 1st appellant court that each days delay have to explain is correct in the light of various decision given by higher court."

3. The sole question arising for considering is whether grounds stated by the appellant for not filing the appeal in time before the lower appellate court was sufficient to condone the delay.

According to the appellant, his brother Chandran was conducting the case, and he made arrangements with his brother to file an appeal, and he was made to believe that appeal was filed. According to him, he came to know the fact of non filing of the appeal only on receipt of notice of E.P. filed by the respondent was received by him. He made enquiries, and then only he understood that his brother cheated him, and joined hands with respondents to defeat the appellant. Appellant gave evidence also. The lower appellate court accepted the evidence rendered by RW.1 to the effect of non appearance of the appellant before the court on the date on which the case came up for trial. The Trial Court also took note of the fact that Chandran who was residing in that property had vacated the premises. I am of the view that instead of taking a technical view, the court below ought to have allowed the application to condone the delay and allowed the appellant to contest the matter. The suit was for setting aside the sale deed and also for recovery of immovable properties. It is settled position of law that the Court shall take a liberal view while dealing with the petition to condone the delay. After hearing all sides, I am of the considered opinion that the view taken by the lower appellate court is too rigid. I am of the view that the appellant is to be given an opportunity to contest the matter on merits. For that purpose, the appeal is to be

allowed and case has to be remanded to the lower appellate court. The appeal is filed in the year 2003. So, it is only just and proper that the lower appellate court hear and dispose of the appeal within a time frame.

4. In the result, the second appeal is allowed. The order passed by the lower appellate court dismissing I.A.No.818/2003 in A.S.No.85/2003 is hereby set aside. I.A.No.818/2003 is allowed and the delay in filing the appeal is condoned. The lower appellate court is directed to take A.S.No.85/2003 back to file, and dispose of the same afresh, in accordance with law, as expeditiously as possible, at any rate, within four months from the date of receipt of a copy of this judgment.

The parties shall appear before the lower appellate court on 15.12.2007.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

R.S.A.No.726 of 2007

J U D G M E N T

Dated:29th October, 2007.